

COPYRIGHT TROLLS: ETHICAL ISSUES

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CHAPTER 19

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BIOGRAPHICAL INFORMATION

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D. Selected Publications

- "Trademark Applications Worth Talking About," TexasBarCLE: 33rd Annual Advanced Intellectual Property, February 2020
- "Litigating a Case with More than Just Patents," TexasBarCLE: 15th Annual Advanced Patent Litigation, July 2019
- "Impressions of a TTAB Oral Argument Hearing From a First-Time Advocate," State Bar of Texas IP Section, Newsletter, August 2018 at 16–19.
- "Texas Supreme Court Update," State Bar of Texas Litigation Section, News for the Bar, November 2017.
- "Impact of Apple v. Samsung on Design Patent Enforcement," TexasBarCLE: 13th Annual Advanced Patent Litigation, July 2017

- “Practical Trial & Motions Tips,” San Antonio Bar Association Seminar: Bench Motions & Trials IX, May 2017 (co-authored with Judge Michael Mery).
- “Gorsuch’s Appointment Could Affect the Deference Given to the USPTO Under Chevron and Auer,” State Bar of Texas IP Section, Newsletter, May 2017 at 17–19.
- “Texas Supreme Court Update,” State Bar of Texas Litigation Section, News for the Bar, March 2017.
- “Texas Supreme Court Update,” State Bar of Texas Litigation Section, News for the Bar, November 2016.
- “Three Precedential Trademark Cases from Fall 2015,” State Bar of Texas IP Section, Newsletter, February 2016 at 8–9.

E. Selected Presentations

- Counterfeiting is Bigger than Handbags: Public Health and Economic Risks, Southwest Fulbright Symposium, San Antonio, Texas, April 2019
- Trademarks in Entertainment Law, Law Society for Sports, Entertainment, and Media, San Antonio, Texas, March 2019
- *The Crossroads of Intellectual Property and Energy Law*, Society of Oil and Gas Students, St. Mary’s University School of Law, San Antonio, Texas, March 2019
- *Trademarks in Professional Sports*, San Antonio Young Lawyers Association, AT&T Center, San Antonio, Texas, January 2019
- A Primer on Trademarks, Counterfeit Pharma Seminar, San Antonio, Texas, February 2018
- An Introduction to Trademarks, State Bar of Texas Pro Bono IP Workshop, El Paso, Texas, January 2018 (co-authored with Marylauren Ilagan)
- Impact of Apple v. Samsung on Design Patent Enforcement, TexasBarCLE: 13th Annual Advanced Patent Litigation, Horseshoe Bay, Texas, July 2017
- Intellectual Property Issues for Health Law Practitioners, San Antonio Bar Association Health Law Section, San Antonio, Texas, March 2017
- An Introduction to Trademarks, State Bar of Texas Pro Bono IP Workshop, Corpus Christi, Texas, January 2017 (co-authored with Darrian Campbell)

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COPYRIGHT TROLLS: ETHICAL ISSUES

Litigators are constantly faced with decisions. What are my best arguments? What word should I use? What suit should I wear? Etc. And some of those decisions involve ethical considerations. We all want to practice on the side of professionalism and civility.

This article highlights several federal court decisions addressing issues of ethics and professional responsibility in cases involving “copyright trolls.”¹ It is not the author’s intention to pick on or criticize specific litigants. Rather, we can learn from past examples and advance the profession together.

I. ***MALIBU MEDIA, LLC V. DOWNS*, NO. 1:14-CV-707, 2015 U.S. DIST. LEXIS 165734 (S.D. OHIO MAY 26, 2015)**

Several of the cases discussed herein concern Malibu Media, LLC. Malibu Media is a company that produces pornographic films. The company has spent approximately ten years suing thousands of people for copyright infringement, alleging the defendants downloaded its films via peer-to-peer file sharing software such as BitTorrent. For reference, Malibu Media filed 7,183 cases nationally from 2012 to 2018. *Strike 3 Holdings LLC v Doe*, 351 F. Supp. 3d 160, 163 (D.D.C. 2018).

In the first case discussed here, the court issued several orders to show cause regarding specific actions or inactions by Malibu Media. The relevant Order (the “May 26, 2015 Order”) was issued *sua sponte* instructing Malibu Media to explain why its amended complaint should not be dismissed with prejudice.

Malibu Media had sued a John Doe defendant identified only by an Internet Protocol address (“IP address”). Malibu Media alleged that the internet subscriber assigned IP address 24.165.105.222 used the BitTorrent file distribution network to infringe twenty-four of Malibu Media’s copyrighted works (e.g., pornographic movies).

Simultaneously, Malibu Media sought expedited discovery from the John Doe’s Internet Service Provider (ISP) for identifying information as to the John Doe. The court allowed the expedited discovery. Malibu Media subsequently filed an amended complaint naming the defendant, and later moved for an extension of time to complete service, which the court granted.

Malibu Media failed to timely file proof of service or seek another extension of time. On February 9, 2015, the court issued an order directing Malibu Media to show cause why its amended complaint should not be dismissed for failure to effect timely service of process by the February 3, 2015 deadline. Malibu Media then filed copies of a summons return indicating that it completed service pursuant to Rule 4(e)(2)(B) on January 8, 2015, which meant Defendant’s answer was due on January 29, 2015. Yet, Malibu Media did not file its proof of service for over a month after completing service, and only after the court issued an order to show cause.

The court acknowledged Malibu Media’s delayed filing of the summons return forced the court to unnecessarily expend judicial resources in the issuance of an order to show cause and hindered the ability of the court to manage its docket.

Next, Malibu Media did not file a Rule 55(a) application for entry of clerk’s default. Thus, on February 18, 2015, the court issued a second order to show cause, which ordered Malibu Media to seek entry of default within fourteen days or to “show cause within 14 days why the complaint should not be dismissed against the Defendant for lack of prosecution.” Thirteen days later—on March 3, 2015—Malibu Media filed an application for entry of clerk’s default. The clerk entered default on March 4, 2015. The entry of default stated that Malibu Media “is noticed to file a motion for default judgment within 21 days.” As of the May 26, 2015 Order, Malibu Media had neither filed a motion for default judgment nor sought an extension of time.

The May 26, 2015 Order addressed Malibu Media’s conduct not only in the present lawsuit—but in Malibu Media’s dozens of then co-pending lawsuits in the Southern District of Ohio and numerous lawsuits around the country. For example, the Court observed Malibu Media’s counsel made a misrepresentation in seeking an extension of time to

¹ Professor Matthew Sag of Loyola University Chicago School of Law has written on and addressed various definitions of “copyright troll.” I believe his 2015 article titled Copyright Trolling, An Empirical Study is worth excerpting here:

Paralleling discussions in patent law, scholars addressing the troll issue in copyright have applied status-based definitions to determine who is, and is not, a troll. This Article argues that the definition should be conduct based. Multi-defendant John Doe litigation should be considered copyright trolling whenever it is motivated by a desire to turn litigation into an independent revenue stream. Such litigation, when initiated with the aim of turning a profit in the courthouse as opposed to seeking compensation or deterring illegal activity, reflects a kind of systematic opportunism that fits squarely within the concept of litigation trolling.

complete service in two cases. *Malibu Media, LLC v. Downs*, No. 1:14-cv-707, 2015 U.S. Dist. LEXIS 165734, *5 (S.D. Ohio May 26, 2015) (citing Motion for Extension of Time, *Malibu Media, LLC v. Jablonki*, No. 1:14-cv-417 (S.D. Ohio Sep. 14, 2014); Motion for Extension of Time, *Malibu Media v. Ramsey*, No. 1:14-cv-718 (S.D. Ohio Feb. 10, 2015)).

In another instance, the Southern District of Ohio “issued an order to show cause after [Malibu Media’s] counsel publicly filed a defendant’s name in direct violation of two orders unambiguously ordering counsel to file that information under seal.” *Id.* (citing *Malibu Media v. Doe*, No. 1:14-cv-493, 2015 U.S. Dist. LEXIS 6649 (S.D. Ohio Jan. 21, 2015)).

The court continued by describing several abusive litigation tactics Malibu Media had committed in other lawsuits, including: swarm joinder and using “Exhibit C” (i.e., attaching an exhibit to a complaint that lists pornographic movies with particularly graphic and explicit titles that the defendant allegedly downloaded, but were neither copyrighted by Malibu Media nor part of its infringement works). Those abusive tactics are discussed below.

A. Swarm Joinder

Other courts had previously addressed and successfully eradicated Malibu Media’s so-called “swarm joinder” model of filing a single mass action against dozens or even hundreds of John Doe defendants who allegedly downloaded the same movie. *See, e.g., Malibu Media, LLC v. Does 1–23*, 878 F. Supp. 2d 628, 631–33 (E.D. Va. 2012). Quoting *Malibu Media, LLC v. Does 1–10*, No. 2:12-cv-3623, 2012 U.S. Dist. LEXIS 89286, 2012 WL 5382304, at *4 (C.D. Cal. June 27, 2012), the Court outlined the methodology of using swarm joinder:

[P]laintiff owns a copyright to a pornographic movie; plaintiff sues numerous John Does in a single action for using BitTorrent to pirate the movie; plaintiff subpoenas the ISPs to obtain the identities of these Does; if successful, plaintiff will send out demand letters to the Does; because of embarrassment, many Does will send back a nuisance-value check to the plaintiff. The cost to the plaintiff: a single filing fee, a bit of discovery, and stamps. The rewards: potentially hundreds of thousands of dollars. Rarely do these cases reach the merits.

A consensus among federal courts emerged that swarm joinder was inappropriate under Rule 20(a)(2) because each defendant’s alleged copyright infringement was a separate and distinct transaction. *See, e.g., Malibu Media, LLC v. Does 1–11*, 286 F.R.D. 113, 115–16 (D.D.C. 2012). Quoting *Malibu Media, LLC v. Does 1–54*, No. 12-cv-1407, 2012 U.S. Dist. LEXIS 103390, 2012 WL 3030302, at *5 (D. Colo. July 25, 2012), the Court described an additional ulterior motive:

Finally, the Court is troubled by many aspects of this “swarm joinder” model for copyright litigation. Courts across the country have observed that Plaintiff (and other companies involved in this type of litigation) do not seem interested in actually litigating their copyright claims. Rather, they appear to be using the federal courts only to obtain identifying information for the ISP owners and then attempting to negotiate a quick settlement.

“In the seven multi-defendant cases in the Peoria Division of the Central District of Illinois, [Malibu Media and two other plaintiffs] paid \$2450 in filing fees. In those same seven cases, there are 97 John Doe defendants. Had these cases been filed as single defendant cases, the [p]laintiffs would have paid nearly \$34,000 in filing fees.” *Malibu Media, LLC v. Downs*, 2015 U.S. Dist. LEXIS 165734, at *11 (citing *In re BitTorrent Copyright Infringement Cases*, No. 12-cv-1188, 2013 U.S. Dist. LEXIS 17851, 2013 WL 501443, at *6 (C.D. Ill. Feb. 11, 2013)).

It appears Malibu Media has stopped employing the swarm joinder tactic. If it arises again in the future, there are numerous cases opposing its use.

B. Exhibit C

The court discussed cases from the Western and Eastern Districts of Wisconsin on the use of Exhibit C. Exhibit C listed pornographic movies with particularly graphic and explicit titles that a defendant allegedly downloaded, but were neither copyrighted by Malibu Media nor part of its infringement works. *Malibu Media LLC v. Doe*, No. 13-cv-207, 2013 U.S. Dist. LEXIS 128615, 2013 WL 4821911, at *1 (W.D. Wis. Sept. 10, 2013).

The Western District of Wisconsin found Malibu Media’s proffered legitimate litigation purposes for attaching Exhibit C was disingenuous: “[Malibu Media’s] intent was to harass and intimidate defendants into early settlements by use of the salacious nature of others’ materials, rather than the merit of its own copyright claims.”

After finding that “there exists no good basis upon which a reasonable attorney—subject to the ethical rules and restrictions of Rule 11—could conclude that attachment of Exhibit C to a complaint ‘for evidentiary purposes only’

served any legitimate purpose at that stage of the litigation,” the court turned to counsel’s subjective intent, which the court found lacking in good faith.

The court in *Malibu Media, LLC v. Doe*, No. 13-cv-536, 2013 U.S. Dist. LEXIS 176701, 2013 WL 6579338, at *4 (E.D. Wis. Dec. 12, 2013) reached a similar conclusion. And found it unavailing that Malibu Media had taken corrective action in that particular case or that Malibu Media had purported to stop using Exhibit C. “Malibu Media is a sophisticated litigant, so it should not be allowed to avoid sanctions simply by adapting its tactics after being questioned by multiple federal judges.” *Id.*

The May 26, 2015 Order finished its discussion of Exhibit C: “Notwithstanding Malibu Media’s contention that it instructed counsel nationwide to never file Exhibit C with a complaint again,” the Court noted—that in a separate case—a continued vestige of Exhibit C in several paragraphs of Malibu Media’s complaint. *Malibu Media, LLC v. Downs*, 2015 U.S. Dist. LEXIS 165734, at *17 (citing *Malibu Media v. Doe*, No. 1:14-cv-383, 2014 U.S. Dist. LEXIS 141831, 2014 WL 4986467, at *5–6 (S. D. Ohio Oct. 6, 2014)).

The May 26, 2015 Order then discussed the sanction standard articulated by *Wu v. T.W. Wang, Inc.*, 420 F.3d 641, 643 (6th Cir. 2005), and concluded:

[T]here is ample evidence that Malibu Media or its “outside general counsel,” rather than its local counsel of record, selects the litigation strategy and tactics. Accordingly, the general principle that “directly sanctioning the delinquent lawyer rather than an innocent client” may not apply here. *Coleman v. Am. Red Cross*, 23 F.3d 1091, 1095 (6th Cir. 1994). The Court of Appeals has held that “just as a lawyer’s inadvertence cannot constitute good cause, neither can inadvertence on the part of the lawyer’s clerical staff; the omissions of the agent are chargeable to the principal.” *Davis v. Brady*, No. 92-6300, 1993 U.S. App. LEXIS 27692, 1993 WL 430137, at *3 (6th Cir. Oct. 22, 1993). Accordingly, “secretarial negligence in serving defendant is chargeable to counsel.” *Friedman*, 929 F.2d at 1157 (citing *Hart v. United States*, 817 F.2d 78, 81 (9th Cir. 1987)). Similarly, secretarial negligence will not excuse failing to promptly file a summons return or failing to move for a default judgment.

....

In the more than 60 Malibu Media cases before this Court, Malibu Media has not shown any indication that it intends to prosecute the merits of its copyright infringement claims.

Malibu Media was advised that the court was inclined to dismiss the lawsuit with prejudice pursuant to Rule 41(b) for failure to prosecute and failure to comply with the Federal Rules of Civil Procedure based on, *inter alia*, Malibu Media’s unexplained delay in filing its summons return and its continued failure to move for default judgment in spite of a directive to do so within twenty-one days. Malibu Media was thereby ordered “to show cause in writing within fourteen days of the entry date of this Order why the amended complaint should not be dismissed with prejudice pursuant to Rule 41(b). Malibu Media shall support its response with verified statements from persons with direct personal knowledge.”

This case presents several takeaways:

- Don’t miss deadlines, and if you do, don’t rely on/force the court to issue a show cause order;
- Don’t make the same mistakes over and over again;
- “Swarm Joinder” is not an effective tactic for avoiding filing fees; and
- Rely on relevant exhibits that advance your client’s case—not merely the client’s leverage.

II. *MALIBU MEDIA, LLC V. DOE*, NO. 4:15-CV-2281, 2016 U.S. DIST. LEXIS 147294 (M.D. PA. OCT. 25, 2016)

This second case concerns a John Doe defendant who moved to disqualify Malibu Media’s attorney, Christopher Fiore (“Attorney Fiore”). John Doe answered an amended complaint, and asserted counterclaims and third-party claims against Malibu Media, the co-owners of Malibu Media and Attorney Fiore. John Doe alleged Malibu Media, Malibu Media’s owners, and Attorney Fiore advertised Malibu’s video content for “free” download on numerous third-party websites, only to later sue individuals who download those same free videos.

John Doe contended that Attorney Fiore’s continued representation of Malibu Media and Malibu Media’s owners (collectively “Malibu”) violated Pennsylvania rules concerning conflicts of interest. Pennsylvania Rule of Professional Conduct 1.7 governs conflicts of interest and provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

PA. R. PROF'L CONDUCT 1.7(a). John Doe contended that Attorney Fiore's attempted representation of himself and Malibu, was "rife with conflicting interests." Notwithstanding Attorney Fiore's protestations to the contrary, the court found that John Doe's claims created potential conflicts of interests between Attorney Fiore and his clients. John Doe's claims called into question Attorney Fiore's representation of Malibu, his litigation tactics, and his professional conduct. John Doe specifically alleged that Fiore knew of and intentionally concealed from Malibu's complaint the fact that Malibu offered much of its material for free download. John Doe suggested that Attorney Fiore violated his ethical duty of candor to the court, as well as ethical duties to his clients, in the course of his representation.

The court noted that at least one court within the circuit had held that the potential for derivative claims between counsel and client precludes counsel from effectively and ethically representing both interests in the same litigation. *See, e.g., Lease v. Rubacky*, 987 F. Supp. 406, 406–08 (E.D. Pa. 1997).

The court noted that Malibu's potential theories of defense—including any argument that they relied on advice of their counsel in taking the challenged actions—would directly implicate Attorney Fiore, pitting counsel's and clients' interests against one another. The court concluded that Attorney Fiore's contemporaneous representation of his codefendant clients and himself contravenes Pennsylvania Rule of Professional Conduct 1.7.

Although Attorney Fiore entered a conflict waiver signed by one of his clients, the conflict waiver was held inadequate. First, the court doubted whether Attorney Fiore could "reasonably believe" that his personal interests would not adversely affect his representation of his clients. *See* Pa. R. Prof'l Conduct 1.7(b)(1).

Second, there is no indication in the conclusory waiver of "any and all conflicts" that Attorney Fiore actually obtained informed consent as defined by the Rules. *See also* Pa. R. Prof'l Conduct 1.0(e).

An additional ground supported disqualification in that Attorney Fiore was likely to be a necessary witness. *See* Pa. R. Prof'l Conduct 3.7(a).

The court rejected Attorney Fiore's assertion that the motion to disqualify was designed exclusively to harass him and his clients and to "gain a tactical advantage in this litigation." The court noted that not one but two bases existed for Attorney Fiore's disqualification.

This case presents several takeaways:

- Conflict waivers are useful but they have limits. Where a conflict waiver could apply, be sure to obtain informed consent and otherwise satisfy all requirements.
- When a conflict waiver will not apply, help your client(s) obtain new counsel and preserve its rights.
- Do not violate your ethical duty of candor to the court.

III. *MALIBU MEDIA LLC V. DUNCAN*, NO. 4:19-CV-02314, 2020 U.S. DIST. LEXIS 20905 (S.D. TEX. 2020)

This case discusses the geolocation technology relied on by Malibu Media for identifying John Doe defendants. In particular, the court considered Defendant Duncan's motion to dismiss for failing to identify Duncan with particularity.

Like thousands of similar lawsuits, Malibu Media initially identified Duncan as a John Doe by using geolocation technology to determine an IP address. Malibu Media later identified Duncan after subpoenaing Duncan's ISP for personal information concerning the person associated with Duncan's IP address (i.e., Duncan). Duncan moved to dismiss the complaint for essentially failing to plead that Duncan committed the infringing activity.

Malibu Media pleads its use of "geolocation technology" as the exclusive basis upon which it identified Duncan's IP address. Duncan challenges the accuracy of the geolocation technology. In particular, Malibu Media did not allege that it actually observed Duncan engaging in infringing acts. It alleges only that its technology identified an IP address "traced to a physical address located within this District," (i.e., the Southern District of Texas).

The court noted: "An allegation that technology accurately observed copyright infringement occurring somewhere amid 44,100 square miles and millions of people is insufficient to plausibly plead infringement by a specific person at a specific address." The court granted Duncan's motion to dismiss on this basis.

The Court acknowledged a second ground for dismissal. Specifically, Malibu Media alleged that its investigator observed infringing conduct on an IP address registered to Duncan. From this, Malibu Media asked the court to make

the jump from Duncan as the registered subscriber of an IP address to Duncan as the actual user of that IP address at the times of which it complains. Duncan responded that “an IP address alone is insufficient to identify a defendant for copyright infringement.”

The question became: whether the mere fact that a person pays for an IP address is enough to state a claim against that person for any and all infringing activity associated with that IP address? The court considered the split of opinions.

Malibu Media cited three decisions allowing its complaints to survive motion to dismiss. The court distinguished these unpublished docket entries as simple orders of denial. Those decisions indicated neither the issues under review nor the reasons in support. Other cases relied on by Malibu Media, held an infringing IP address is enough under Rule 12(b)(6). *See, e.g., Countryman Nevada LLC v Pitts*, No. 6:14-cv-493-Orl-40GJK, 2014 U.S. Dist. LEXIS 173549, 2014 WL 7178077, *2 (MD Fla) (collecting eight cases).

Those cases typically agree “that subscriber identity does not always correspond with infringer identity.” *Malibu Media LLC v John Does 1–11*, 2013 U.S. Dist. LEXIS 99332, 2013 WL 3732839, *4 (S.D.N.Y. July 16, 2013). The court noted that those cases appear to improperly shift the burden in the first instance to the defendant, where the question is the plausibility of the connection to liability, not its mere possibility, and where conclusory allegations of that liability are insufficient.

The court found that the growing weight of authority favors Duncan’s contrary position, including the Ninth Circuit’s decision in *Cobbler Nevada LLC v Gonzales*, 901 F3d 1142 (9th Cir 2018):

Although copyright owners can often trace infringement of copyrighted material to an IP address, it is not always easy to pinpoint the particular individual or device engaged in the infringement. Internet providers, such as Comcast or AT&T, can go so far as to identify the individual who is registered to a particular IP address (i.e., an account holder) and the physical address associated with the account, but that connection does not mean that the internet subscriber is also the infringer. The reasons are obvious—simply establishing an account does not mean the subscriber is even accessing the internet, and multiple devices can access the internet under the same IP address.

The mere possibility that a defendant engaged in prohibited conduct is insufficient to state a claim: “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v Iqbal*, 556 US 662, 678 (2009) (quoting *Bell Atlantic Corp v Twombly*, 550 US 544, 555 (2007)). Yet Malibu Media in its amended complaint simply converts from pleading that it observed conduct on an IP address to alleging that Duncan himself was the one doing so.

The court concluded Malibu Media had not “nudged” its claims “across the line from conceivable to plausible.” Malibu Media alleged no personal contact with or investigation of Duncan. And so the amended complaint contains no allegations that Duncan acknowledged personal involvement in any download or distribution, that he has exclusive access to his IP address, or “even circumstances which might increase the likelihood that the subscriber is the infringer (such as defendant’s living arrangements or network details).”

This case presents several takeaways:

- Pleading matters. “Copyright troll” cases or not, geolocation technology is likely to become more prevalent in presuit investigations. As that occurs, it is important for plaintiffs to properly plead, but only after a sufficient investigation has occurred.
- Where multiple people may have a likely connection to an IP address, the plaintiff might need to conduct further investigation beyond the geolocation technology.
- Defense counsel should recognize these requirements when evaluating whether a case is properly pled or not.

IV. *MONDRAGON V. NOSRAK LLC*, NO. 19-CV-01437-CMA-NRN, 2020 U.S. DIST. LEXIS 82934 (D. COLO. MAY 11, 2020)

The defendant moved to dismiss for failure to prosecute after the plaintiff’s counsel, Mr. Richard Liebowitz, failed to submit a revised scheduling order reflecting the dates and discovery limitations decided at an earlier scheduling conference, and a similar failure by Mr. Liebowitz to provide initial Rule 26(a) disclosures.

On April 27, 2020, the Court ordered plaintiff on or before April 30, 2020 to:

- (1) electronically serve his Rule 26 initial disclosures on defendants, and
- (2) submit to the court the revised scheduling order.

The April 27th Order also directed that if plaintiff wished to otherwise respond to the motion to dismiss, he was to do so on or before May 1, 2020.

Mr. Liebowitz purported to comply with the April 27th order by submitting, on April 30, 2020, another version of the Scheduling Order. Apparently, Mr. Liebowitz sent a first copy to opposing counsel at 10:45 p.m. that night, with an e-mail stating words to the effect of “If I do not hear from you in 45 minutes, I will submit this to the Court without your input.” Mr. Liebowitz then submitted the document without input from defense counsel. Mr. Liebowitz did not account for anything discussed or agreed to at the scheduling conference, nor did it provide any more detail to several sections as had been specifically requested.

The motion to dismiss was denied, however, the court, as an alternative sanction, ordered plaintiff’s counsel to associate with a qualified Colorado federal court practitioner in order to proceed with the case. Plaintiff’s counsel was further instructed to file a copy of the order, with a cover sheet titled “NOTICE OF ATTORNEY SANCTION,” in any case he currently had pending in the District of Colorado and in any future cases that he may file in the court for the next six months.

The court extensively discussed Mr. Liebowitz’s litigation conduct in similar copyright cases in the District of Colorado and other courts around the United States, including:

- *Rock v. Enfants Riches Deprimes, LLC*, No. 17-cv-2618-ALC, 2020 U.S. Dist. LEXIS 15081, 2020 WL 468904 (S.D.N.Y. Jan. 29, 2020) (awarding \$100,008 in attorneys fees and costs against plaintiff for advancing objectively unreasonable and frivolous arguments and ordering Mr. Liebowitz and his firm to pay \$10,000 of the award as a sanction for bad faith litigation conduct, including failing to investigate evidentiary basis for complaint, stonewalling discovery, misleading the court, and making meritless arguments);
- *Romanowicz v. Alister & Paine, Inc.*, 17-cv-8937-PAE-KHP (S.D.N.Y. June 22, 2018), ECF No. 24 (ordering Mr. Liebowitz to pay \$200 to the Clerk of Court as a consequence of his failure to comply with an order directing him to file an affidavit of service of a default judgment);
- *Ferdman v. CBS Interactive, Inc.*, 342 F. Supp. 3d 515 (S.D.N.Y. 2018) (imposing discovery sanction of precluding Mr. Liebowitz’s plaintiff client from relying on documents that were requested in discovery but never produced—resulting in denial of the plaintiff’s motion for summary judgment on issue of infringement);
- *Rice v. NBCUniversal Media, LLC*, No. 19-CV-447 (JMF), 2019 U.S. Dist. LEXIS 114690, 2019 WL 3000808, at *1 (S.D.N.Y. July 10, 2019) (imposing \$8,745.50 sanction on Mr. Liebowitz and his firm “for his repeated failure to comply with this Court’s orders, failures that imposed considerable and unwarranted costs on the Court, its staff, and Defendant”);
- *Pereira v. 3072541 Canada Inc.*, No. 17-CV-6945 (RA), 2018 U.S. Dist. LEXIS 195406, 2018 WL 5999636, at *3 (S.D.N.Y. Nov. 15, 2018) (“The Court finds particularly concerning Mr. Liebowitz’s repeated failures to follow the orders and rules of this Court and others within the district, as well as his propensity to take unreasonable positions and to omit crucial facts—or even to make outright misrepresentations—in an apparent attempt to increase costs and to extort unwarranted settlements.”);
- *Steeger v. JMS Cleaning Servs., LLC*, No. 17-CV-8013 (DLC), 2018 U.S. Dist. LEXIS 42797, 2018 WL 1363497, (S.D.N.Y. March 15, 2018) (imposing sanction of \$2,000 on Mr. Liebowitz personally and requiring him to attend four CLE credit hours in ethics and professionalism);
- *Craig v. UMG Recordings, Inc.*, 380 F. Supp. 3d 324, 2019 WL 1432929, at *10 (S.D.N.Y. 2019) (imposing personal sanctions on Mr. Liebowitz and his firm for filing meritless disqualification motion in bad faith and requiring court to hold wasteful and unnecessary evidentiary hearing);
- *Polaris Images Corp. v. CBS Interactive, Inc.*, 19-cv-3670 (VEC), 2019 U.S. Dist. LEXIS 175618, 2019 WL 5067167 (S.D.N.Y. Oct. 9, 2019) (ordering Mr. Liebowitz to pay sanction of \$1,500 after failing to provide adequate or convincing reasons for his failure to comply with two explicit and simple directions contained in a court order, dismissing the excuse of “administrative errors”);
- *Terry v. Masterpiece Advertising Design*, 19-cv-8240 (NRB), 2018 U.S. Dist. LEXIS 104467, 2018 WL 3104091 at *2 (S.D.N.Y. June 21, 2018) (admonishing Mr. Liebowitz for repeating arguments that “have no basis in law”).

Some judges of the Eastern and Southern Districts of New York have required Mr. Liebowitz’s clients to post cost bonds as a condition of proceeding with their cases:

- *Lee v. W Architecture and Landscape Architecture, LLC*, 18-cv-05820 (PKC) (CLP), 2019 U.S. Dist. LEXIS 89335, 2019 WL 2272757 (E.D.N.Y. May 28, 2019) (granting defendant’s motion for \$10,000 cost bond, citing in part Mr. Liebowitz’s failure to timely file motion papers and history of failing to follow court orders in other cases);

- *Reynolds v. Hearst Comm'ns, Inc.*, 17-cv-6720 (DLC), 2018 U.S. Dist. LEXIS 35453, 2018 WL 1229840 (S.D.N.Y. March 5, 2018) (finding that Mr. Liebowitz had failed to comply with court orders, “as he has in other lawsuits” and ordering the plaintiff to post a bond of \$10,000);
- *Leibowitz v. Galore Media, Inc.*, 18-cv-2626 (RA) (HBP), 2018 U.S. Dist. LEXIS 161110, 2018 WL 4519208 (S.D.N.Y. Sept. 20, 2018) (denying motion for reconsideration of order requiring \$10,000 cost bond citing “history of con-compliance with court orders in similar actions”);
- *Cruz v. Am. Broadcasting Cos., Inc.*, 17-cv-8794 (LAK), 2017 U.S. Dist. LEXIS 196317, 2017 WL 5665657 (S.D.N.Y. Nov. 17, 2017) (finding on the face of the complaint “serious questions as to the merits of plaintiff’s claim” and ordering Mr. Liebowitz’s client to show cause why an order should not be entered requiring security for costs as a condition of proceeding further).

The Court cited several cases in the District of Colorado where deadlines were missed and other abuses occurred. *See, e.g., Stelzer v. Lead Stories, LLC*, No. 19-cv-000473-PAB-KMT, 2019 U.S. Dist. LEXIS 178344, 2019 WL 5095691 (D. Colo., Recommendation of June 11, 2019).

The Court then considered an October 7, 2019 order of disbarment entered by the Northern District of California after it came to that court’s attention that Mr. Liebowitz had filed numerous cases in the Northern District without being a member of the State of California bar and without seeking *pro hac vice* admission, as was required under the Northern District of California’s rules. *See In the Matter of Richard P. Liebowitz*, Case No. 19-mc-80228-JD (N.D. Cal. October 7, 2019). Ten days later, the same judge issued a supplemental order when it became apparent that Mr. Liebowitz had failed to comply with the portion of the disbarment order requiring Mr. Liebowitz to notify all judges of the Northern District of California before whom Mr. Liebowitz had cases of the disbarment. *Id.* (Order of October 17, 2019).

On May 5, 2020, the District of Colorado issued an order requiring Mr. Liebowitz to show cause at a May 7, 2020 telephonic hearing why he should not be required to associate with an experienced Colorado federal practitioner as a condition of continuing to prosecute this case.

This case presents several takeaways:

- Seek and learn from mentors.
- Hire local counsel when practicing in a less familiar jurisdiction, or if required by local rules.
- Hire staff/other attorneys or outsource work if your workload is sufficiently busy that you start missing deadlines.
- Join and participate in bar associations.

V. CONCLUSION

Without repeating case specific takeaways, the highlighted cases reveal several themes:

- Jurists want attorneys to do well and succeed.
- Jurists will take note of an attorney or a party who routinely violates court rules or orders.
- Clients should be warned of the risks that arise from abusive tactics—especially over time.
- Attorneys are well advised to follow the rules, treat one another with civility, and maintain deadlines.

Practicing law is fun and fulfilling and certainly presents challenges. Hopefully we can learn from these decisions and be prepared to make smart, ethical decisions in our practices.